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No. 10-857

Supreme Court, U.S.
FILED
MAR 2 9 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

COUNTY OF ORANGE [CALIFORNIA],
HELEN DWOJAK, and MARCIE VREEKEN,

Petitioners,

v.

DEANNA FOGARTY-HARDWICK,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division Three

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL STATUTORY PROVISION INVOLVED

California Welfare and Institutions Code section 328 provides:

Whenever the social worker has cause to believe that there was or is within the county, or residing therein, a person described in Section 300, the social worker shall immediately make any investigation he or she deems necessary to determine whether child welfare services should be offered to the family and whether proceedings in the juvenile court should be commenced. If the social worker determines that it is appropriate to offer child welfare services to the family, the social worker shall make a referral to these services pursuant to Chapter 5 (commencing with Section 16500) of Part 4 of Division 9. No inference regarding the credibility of the allegations or the need for child welfare services shall be drawn from the mere existence of a child custody or visitation dispute.

However, this section does not require an investigation by the social worker with respect to a child delivered or referred to any agency pursuant to Section 307.5.

The social worker shall interview any child four years of age or older who is a subject of an investigation, and who is in juvenile hall or other custodial facility, or has been removed to a foster home, to ascertain the child's view of the home environment. If proceedings are commenced, the social worker shall

include the substance of the interview in any written report submitted at an adjudicatory hearing, or if no report is then received in evidence, the social worker shall include the substance of the interview in the social study required by Section 358. A referral based on allegations of child abuse from the family court pursuant to Section 3027 of the Family Code shall be investigated to the same extent as any other child abuse allegation.

The County of Orange (California), Helen Dwojak, and Marcie Vreeken respectfully file this reply in support of their petition for a writ of certiorari to the California Court of Appeal, Fourth Appellate District, Division Three.

INTRODUCTION

Respondent Deanna Fogarty-Hardwick has consistently argued "waiver" in attempting to defend her multi-million dollar verdict against the County of Orange and two of its social workers for "loss of familial association." She uses this tactic again in her brief in opposition, additionally contending that the County has been less than candid with this Court. Nonsense. While the County believes that all issues were adequately preserved, its petition accurately summarized the rulings below.

Waiver was not a cornerstone of the California Court of Appeal's opinion. Rather, it addressed the merits of the County's arguments. Those arguments,

in turn, form the basis for the County's petition. Deanna has never identified *any* evidence outside the parameters of this case – other than the responses to her questionable requests for admissions – that showed a County policy sufficient to establish liability under *Monell v. Department of Social Services*, 435 U.S. 658 (1978). This Court should grant certiorari or, at a minimum, grant, vacate and remand for reconsideration in light of *Connick v. Thompson*, No. 09-571 (argued Oct. 6, 2010), and cases such as *Copper v. City of Fargo*, 905 F.Supp. 703 (D. N.D. 1995), and *Quezada v. County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991).

FURTHER REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Issues Concerning *Monell* Liability Are Properly Before This Court.

Petitioners did not "waive all their *Monell* issues," as Deanna asserts. One need look no further than the California Court of Appeal's opinion in this matter to conclude that the *Monell* liability issues are properly before this Court. In its petition, the County summarized the Court of Appeal's analysis concerning *Monell* liability as follows: "The County waived its argument concerning the lack of substantial evidence to support a County policy but, in any event, the responses to the requests for admissions constituted substantial evidence." Petn. at 20 (citing App. 36). That is precisely what the Court of Appeal held. It did not stop with a waiver analysis, but stated:

"Assuming, as the County states, it represented in discovery that its social workers (whom the jury concluded had lied and fabricated evidence) 'acted pursuant to municipal policy and custom,' that admission would be sufficient to sustain the challenged finding." App. 36. The Court of Appeal also noted the County's acknowledgment of the evidence of misconduct in the underlying dependency case. App. 24-25 n. 4.

There is no waiver here. And as will be shown below, Deanna cannot identify *any* evidence in the record – other than the responses to the requests for admissions – that would establish *Monell* liability. That is what the *Connick* case is all about.

II. Just as in *Connick*, Plaintiff Presented No Evidence Other Than From the Underlying Case to Show a Governmental Policy and *Monell* Liability.

Deanna attempts to distinguish *Connick* by identifying "evidence" beyond the confines of the underlying dependency case to establish *Monell* liability. Deanna's opposition brief conclusively demonstrates that such "evidence" does not exist.

A. The Policy of "Baseless Allegations" in Dependency Petitions.

Deanna cites to evidence of "an agency policy of charging the non-abusing parent with failure to protect the child even when it knew there was no evidence to support it." Opp. br. at 33. But as the

Court of Appeal held in this case, such an allegation is expressly permitted by California law: "Under this provision [Cal. Welf. & Inst. Code § 300, subd. (b)], it is clear that a parent's mere 'failure or inability' to 'adequately supervise or protect' the child is distinguished from the parents' 'willful or negligent' failure to do so, and that the Legislature intended *either* circumstance would be a sufficient basis for imposing dependency jurisdiction." App. 47 (italics in original). This is why the Court of Appeal *reversed* the injunction that Deanna had persuaded the trial court to impose. *Id.* As a matter of law, this allegation could not cause any compensable harm to Deanna.[1]

B. The Policy of Preventing Parents' Presence When Children Are Questioned.

Although she has never relied on it before, Deanna now claims that the County had "a policy of not allowing parents to be present when their children were interrogated." Opp. br. at 33-34 (citing Resp. App. 27-28, 91-92). The "interrogation" to which Deanna cites occurred *two weeks after* the children were removed from her custody, and thus could not have caused the harm for which the jury awarded

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[1] According to Deanna, petitioners' "protest that Fogarty-Hardwick was not harmed by their filing and pursuit of knowingly baseless allegations is also particularly baseless" and "ignore[s] the evidence." Opp. br. at 33. But it is Deanna who ignores the evidence: the Court of Appeal's express holding to the contrary.

damages. App. 9 (children removed Feb. 17); Resp. App. 27 ("interrogation" occurred on March 3). Moreover, Deanna presented no evidence (nor does she cite to any) that this policy caused her any harm.[2]

Finally, the County's policy of not allowing parents to be present when children are questioned is consistent with California law. California Welfare and Institutions Code section 328 provides that "[t]he social worker shall interview any child four years of age or older who . . . has been removed to a foster home[ ] to ascertain the child's view of the home environment." While section 328 does not *explicitly* bar a parent's presence at such an interview, it is rational for a county to conclude that a "child's view of the home environment" will be more accurate if his or her parent is not present at the interview.

C. The Testimony of Plaintiff's Expert.

Deanna relies on the testimony of her expert (William London) "that Petitioners' conduct demonstrated the County's regularly-established policies, customs, and practices with regard to the training and supervision of its social services agents." Opp. br. at 34. But London's testimony was based solely on

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[2] Deanna cites to testimony that supervisor Dwojak supposedly "didn't care" whether her workers fabricated evidence. Opp. br. at 34 (citing Resp. App. 67-70). The cited testimony only establishes that Dwojak believed Vreeken and disbelieved Deanna in this case. But in any event, Dwojak's beliefs do not constitute evidence of a County policy.

documents and other evidence *in this case*. Reply App. 3-7 (London relied on depositions, social services agency's file, Deanna's medical records, children's school records, children's therapist's records, discovery responses, and interview with Deanna). London then extrapolated a County policy of believing the social workers, disbelieving parents and children, and protecting social workers. Reply App. 8-10. Such evidence does not establish an actionable policy under *Monell*. *Stokes v. Bullins*, 844 F.2d 269, 275 (5th Cir. 1988) (expert testimony by itself insufficient to establish constitutional "fault" by a municipality); *Holland v. City of Houston*, 41 F.Supp.2d 678, 708 (S.D. Tex. 1999) ("When seeking to prove a municipality's malevolent motive, plaintiffs must introduce more evidence than merely the opinion of an expert witness").

The *Connick* case may not have had a witness like London. But it wouldn't have mattered. The testimony of an expert about the existence of a "policy" in the absence of other similar incidents is insufficient as a matter of law to establish liability under *Monell*.

D. The "Notice" Purportedly Provided by California Government Code Section 820.21 Is Irrelevant.

Finally, Deanna attempts to distinguish *Connick* by arguing that Louisiana has no equivalent to California Government Code section 820.21. That statute

purports to abrogate "any" civil immunity accorded to social workers who commit perjury, fabricate evidence, or fail to disclose known exculpatory evidence. Opp. br. at 1.

As an initial matter, section 820.21 does not apply here. In *Parkes v. County of San Diego*, 345 F.Supp.2d 1071 (S.D. Cal. 2004), the court held that section 820.21 is not applicable in a federal civil rights case, stating: "Section 820.21 does not affect federal immunity principles available to social workers for conduct undertaken in the initiation and pursuit of dependency proceedings in a Section 1983 claim." *Id.* at 1087.[3]

Moreover, Deanna fails to explain how the existence of this statute provides any meaningful distinction between the present case and *Connick*. At least since *Brady v. Maryland*, 373 U.S. 83 (1961), prosecutors have been under a duty not to lie or to fabricate or suppress evidence. The undisputed evidence in this case is that social workers were likewise aware of such obligations. App. 103-107 (social workers are not to provide perjured testimony and they may be held personally liable if they fabricate evidence). The prosecutors in *Connick* were on notice that their conduct was not appropriate, just like the social workers here; the presence or absence of a Louisiana

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[3] Although petitioners briefed this issue below, the California Court of Appeal did not rely on section 820.21 and thus the issue was not raised in the petition to this Court.

statute such as section 820.21 is irrelevant. The question is whether *Monell* liability can be premised on a single incident, not whether governmental workers "knew" their conduct was wrong.

III. Perceived Differences in State and Federal Requests for Admissions Are Irrelevant in a Federal Civil Rights Action and Played No Part in the Analysis of the *Hudson* and *Copper* Opinions.

Deanna points to perceived procedural differences between California and federal practice in dealing with requests for admissions. Opp. br. at 27-28. But she fails to show how any of them are relevant to the question posed by the petition: Is a response that a social worker's unspecified conduct complied with a county's custom or practice sufficient evidence of a governmental policy under *Monell*? The question presented deals solely with the requisite quantum of proof in a federal civil rights action. It is not relevant how the requests or the responses came about or the jurisdiction in which the case arose. As argued in the petition, one of the main problems with this case is that it demonstrates "the haphazard and inconsistent application of federal law in state tribunals." Petn. at 6.

Deanna's attempts to distinguish the federal cases rejecting responses like those at issue here are similarly misguided. For example, she claims that in *Hudson v. City of N. Las Vegas*, No. 2:04-CV-01518,

2007 U.S. Dist. Lexis 2377 (D. Nev. Jan 4, 2007), the court "already found" no constitutional violation and thus the response to the request for admission was "unimportant." Opp. br. at 25-26. Such a contention is belied by the *Hudson* opinion itself. The district court found that, "*even if* Hudson had shown Defendants violated his constitutional rights," *Monell* liability was not shown because the responses only demonstrated the "municipality's opinion regarding the constitutionality of its employees' conduct [and was] irrelevant with respect to whether a municipality promulgated a policy causing its employees to act unconstitutionally." *Id.* at *22-23 (first italics added).

Deanna claims that *Copper v. City of Fargo*, 905 F. Supp. 703 (D. N.D. 1995), does not apply because the district court "did not find the plaintiff's requests for admissions were improper, ..." Opp. br. at 26. Petitioners have never claimed that Deanna's requests in this case were "improper." Rather, the issue is whether an affirmative response to a request asking whether unspecified conduct complied with county policy is sufficient by itself to establish *Monell* liability. The *Copper* court found that it was not because the response was "only as an acknowledgement that the defendant police officers acted pursuant to existing policies and training, ... The admissions are not the equivalent of an affirmative decision, cast in the form of a policy statement, to ignore training deficiencies or to completely omit training about the proper enforcement of the residential antipicketing

ordinance." *Id.* at 708. *Copper*'s analysis applies equally to the present case.

IV. Civil Rights Plaintiffs Alleging Deprivation of Rights in Family or Dependency Proceedings Should be Required to First Show That They Would Have Prevailed in Those Proceedings.

In her opposition brief, Deanna largely parrots the California Court of Appeal's reasons why *Heck v. Humphrey*, 512 U.S. 477 (1994), should not be applied to dependency or family law proceedings. The County dealt with those reasons in its petition and will not repeat those arguments here.

Deanna disingenuously argues that the family court order awarding custody to her ex-spouse, Cary, was "never admitted at trial." Opp. br. at 40. The jury may have never seen it, but it *was* part of the trial court record because *Deanna introduced it*. In a pretrial motion, Deanna successfully sought to bar evidence of "coaching" her children concerning sexual abuse allegations. Deanna argued that such evidence was barred by collateral estoppel because when the family court decided not to award attorneys' fees against her for making wrongful accusations of abuse against Cary, this determined whether K. was abused and did not allow redetermination of the issue. Deanna supported her motion with a copy of the family court's

operative custody order. Reply App. 12-18.[4] Petitioners did not have to seek judicial notice of this order because *Deanna already had made it part of the record*.

Deanna also argues that the juvenile court detention order removing her children was nonappealable. Opp. br. at 40. While that is true, the family court custody order (that she introduced into the record), awarding custody to Cary, *was* appealable. *Enrique M. v. Angelina V.*, 121 Cal.App.4th 1371, 1377-1378, 18 Cal.Rptr.3d 306, 310-311 (2004) (and cases cited therein). Deanna never appealed from the family court's custody determination. That failure should bar her from re-examining the issue under the analysis of *Heck*.

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[4] Deanna asserts that petitioners "rely heavily on matters outside the trial record, ..." This is blatantly false. All of the materials contained in the appendix to the petition were part of either the clerk's or reporter's transcripts on appeal. In contrast, Deanna includes in her appendix two documents that were *not* part of the record: an opposition to her attorneys' fee motion (filed several months *after* the California Court of Appeal's decision) and an unpublished California Court of Appeal opinion, which cannot be cited as precedent in California.

V. The California Court of Appeal's Opinion Finding Waiver of Absolute Immunity is Inconsistent With Federal Court Precedents.

Deanna argues that "federal pleading procedures do not apply in state courts." Opp. br. at 42. Petitioners never argued otherwise. The question is whether a governmental entity waives the defense of absolute immunity in a federal civil rights case when it raises the defense in pretrial motions but does not affirmatively plead it in its answer. Deanna can cite no case – state or federal – that has found a waiver under these circumstances (except the court in this case).

Deanna then returns to her waiver theme, stating without explanation that petitioners waived the issue on appeal by "failure to designate an adequate record." Opp. br. at 42, citing App. 30-32. The citation to App. 30-32 is a portion of the California Court of Appeal's opinion, which says nothing about the failure to designate. In fact, it says the opposite, noting that petitioners' motion to amend its answer was part of the record on appeal. App. 31 n. 7. Once again, there is no waiver of the issue.

CONCLUSION

All of the issues raised in the petition are properly before this Court. The brief in opposition fails to minimize the significance of those issues. This Court should grant certiorari or, alternatively, grant, vacate and remand for reconsideration in light of *Connick* and cases such as *Copper* and *Quezada*.

Respectfully submitted,

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, COMPLEX JUSTICE CENTER

DEPARTMENT CX103

DEANNA FOGARTY-HARDWICK, PLAINTIFF, VS. COUNTY OF ORANGE, MARCIE VREEKEN, ELAINE WILKINS, AND HELEN DWOJAK, DEFENDANTS.	)	NO. 01CC02379

HONORABLE RONALD L. BAUER,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

FEBRUARY 27, 2007

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OFFICIAL COURT REPORTER

* * *

[1064] **RAY WILLIAM LONDON,**

CALLED AS A WITNESS BY AND ON BEHALF OF THE PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. SUTHERLAND:

* * *

[1083] Q ALL RIGHT. NOW I WOULD LIKE TO TURN TO WHAT YOU ARE BASING THE OPINIONS YOU ARE GOING TO GIVE ON.

OKAY?

A UH-HUH.

Q FIRST I WANT TO ASK YOU, HOW MUCH MATERIAL DID YOU READ IN THIS CASE? CAN YOU GIVE US AN IDEA OF THE VOLUME?

A IT STANDS ABOUT EIGHT FEET.

Q DID YOU MAKE A LIST OF THE MATERIALS THAT YOU [1084] REVIEWED IN FORMULATING YOUR OPINIONS?

A YES, I DID.

MS. SUTHERLAND: YOUR HONOR, MAY I APPROACH?

THE COURT: YOU MAY.

MS. SUTHERLAND: I'M SHOWING THE WITNESS WHAT WAS MARKED AS EXHIBIT 1 TO DR. LONDON'S DEPOSITION TRANSCRIPT.

BY MS. SUTHERLAND:

Q DO YOU RECOGNIZE THIS DOCUMENT?

A YES, I DO.

Q WHAT IS THIS DOCUMENT?

A THIS IS THE LIST OF THE DEPOSITIONS AND THE RECORDS THAT I REVIEWED, AS WELL AS DATES AND FOCUS OF LETTERS THAT I RECEIVED FROM YOU. . . .

* * *

Q I'M NOT GOING TO GO THROUGH EVERYTHING ON THE LIST, BUT I WANT TO ASK YOU A FEW CATEGORIES OF ITEMS.

DID YOU REVIEW IN THIS CASE THE ENTIRE SOCIAL SERVICES AGENCY FILE?

[1085] A YES.

Q ABOUT HOW THICK WAS THAT FILE?

A I DON'T KNOW. SIX, SEVEN INCHES, EIGHT INCHES.

Q DID YOU ALSO REVIEW THE JUVENILE COURT FILE?

A YES.

Q DID YOU REVIEW PLAINTIFF'S TREATMENT RECORDS FROM DOCTORS WARNER AND WALDROP AND FROM MS. JANICE BEACON?

A YES.

Q DID YOU REVIEW KENDALL'S SCHOOL RECORDS DATING BACK TO WHEN SHE STARTED?

A YES.

Q ABOUT HOW VOLUMINOUS WERE THOSE RECORDS?

A I DON'T KNOW. SEVEN OR EIGHT INCHES, AS I REMEMBER. THERE WERE A LOT.

Q DID YOU ALSO REVIEW DR. MITCHELL'S RECORDS REGARDING HER COUNSELING OF THE GIRLS OVER THE YEARS?

A YES.

Q ABOUT HOW THICK WERE THOSE RECORDS?

A ABOUT SIX, SEVEN INCHES.

Q AND I'M GOING TO GO THROUGH A LIST OF SOME NAMES, AND I'M GOING TO ASK YOU WHETHER OR NOT YOU READ THESE PERSONS' DEPOSITION TRANSCRIPTS IN FORMULATING YOUR OPINIONS.

MRS. FOGARTY-HARDWICK?

A YES.

[1086] Q DID YOU READ ELAINE WILKINS?

A YES.

Q HELEN DWOJAK?

A YES.

Q JOYCE REILY?

A YES.

Q LARRY LEAMAN?

A YES.

Q MARCIE VREEKEN?

A YES.

Q DR. MARJORIE MITCHELL?

A YES.

Q PATRICIA DUMAS?

A YES.

Q RACHEAL DAVIS?

A YES.

Q SUSAN HOLL?

A YES.

Q DR. BARBARA WARNER?

A YES.

Q CARY HARDWICK?

A YES, I THINK I DID.

Q AND JANICE BEACON?

A YES.

Q DID YOU ALSO READ DR. MITCHELL'S – WELL, EXCERPTS FROM DR. MITCHELL'S TESTIMONY FROM THE FAMILY [1087] COURT TRIAL?

A YES.

Q DID YOU ALSO READ PORTIONS OF MS. DAVIS'S TESTIMONY FROM THE JUVENILE COURT TRIAL?

A YES.

Q DID YOU ALSO REVIEW VARIOUS RESPONSES TO INTERROGATORIES OR WRITTEN QUESTIONS BETWEEN THE PARTIES TO THIS CASE AND RESPONSES TO REQUESTS FOR ADMISSIONS?

A YES.

Q IN WHAT MONTH DID YOU BEGIN RECEIVING ALL OF THESE MATERIALS FROM MY OFFICE FOR REVIEW?

A APRIL OF 2006.

Q AND SO YOU HAD SEVERAL MONTHS THEN TO REVIEW THEM BEFORE GIVING YOUR OPINION IN THIS CASE?

A YES.

Q DID YOU ALSO EVALUATE THE PLAINTIFF IN A FACE-TO-FACE INTERVIEW?

A YES.

Q ABOUT HOW MUCH TIME DID YOU SPEND IN THAT PROCESS?

A ABOUT FOUR, FOUR AND A HALF HOURS.

Q WHEN DID YOU CONDUCT THAT INTERVIEW?

A THE LATTER PART OF 2006.

Q WHAT DID THE INTERVIEW ENTAIL?

A IT ENTAILED A BRIEF PSYCHOSOCIAL HISTORY AND A REVIEW OF THE SYMPTOMS THAT SHE HAD EXPERIENCED AND THE [1088] BASIC BACKGROUND OF WHAT SHE AND THE CHILDREN HAVE GONE THROUGH. . . .

* * *

(NOON RECESS.)

* *

[1116] Q AFTER HAVING REVIEWED ALL THESE MATERIALS IN THIS CASE, DID YOU

ALSO FORM AN OPINION AS TO THE SOCIAL SERVICES AGENCY'S HANDLING OF THIS CASE?

A YES.

Q WHAT ARE YOUR OPINIONS – YOUR OVERALL OPINIONS OF THEIR HANDLING OF THIS CASE?

MR. STEBENS: OBJECTION; FOUNDATION, LACK OF EXPERTISE.

THE COURT: OVERRULED.

THE WITNESS: I THINK THAT THEY HAD POLICIES AND PROCEDURES THAT DID NOT REQUIRE APPROPRIATE INTERVENTION.

I THINK THAT THEY HAVE – THEY HAD A SYSTEM WHERE, WHEN THERE IS A DIFFERENCE OF OPINION BETWEEN THE CLIENT OR THE CHILDREN OR THE SOCIAL WORKER, THAT THE SOCIAL WORKER TAKES PRECEDENCE.

I THINK THEY HAVE A POLICY AND PRACTICES OF DISBELIEVING THE CLIENT AND THE CHILDREN.

I THINK THAT THEY PUT THE INTERESTS OF PROTECTING THE SOCIAL WORKER OVER THE BEST INTERESTS OF THE CHILD.

I THINK THAT THEY ACCUSED THE MOTHER OF THINGS AS A MATTER OF COURSE, LIKE

JUST BOILERPLATE ACCUSATIONS WITHOUT JUSTIFICATION OR WARRANT.

[1117] I THINK THEY HAVE A PROCEDURE AND A POLICY THAT SAYS THAT THEY DON'T EVEN HAVE TO FOLLOW SOME OF THEIR OWN POLICIES AND PROCEDURES.

I THINK, CONTRARY TO FEDERAL GUIDELINES, THEY EXPERIMENTED WITH THE PARENT-CHILD RELATIONSHIP BY REMOVING THE CHILD WITH KNOWN HARM, BECAUSE EVERY SOCIAL WORKER KNOWS THAT THERE IS HARM WHEN YOU MOVE CHILDREN. YOU HAVE TO BALANCE THAT OUT.

AND THE ONLY THING I FOUND IN THE CASE WAS THAT THE SOCIAL WORKERS WANTED TO ASSESS WHAT KIND OF INFLUENCE THE MOTHER WAS HAVING ON THE CHILDREN; AND, YOU KNOW, THAT'S INAPPROPRIATE AND IT'S UNPROFESSIONAL AND IT'S NOT A VALID JUSTIFICATION. IT'S SOME ISSUES OF THE POWER OF THE SOCIAL WORKER.

AND THEY IGNORED OTHER PROFESSIONALS' JUDGMENTS ABOUT THE FACT THAT THERE WASN'T ANY HARM OR THEY DIDN'T HAVE A SYMBIOTIC RELATIONSHIP. SOCIAL WORKER AFTER SOCIAL WORKER AFTER SOCIAL WORKER, PSYCHOLOGIST AFTER PSYCHOLOGIST AFTER PSYCHOLOGIST SAID THIS IS FINE, EVERYTHING IS OKAY, YOU KNOW. AND THEN ALL OF A SUDDEN, A NEW SOCIAL

WORKER IS ASSIGNED TO THE CASE AND ALL OF THAT EVIDENCE IS OUT AND IT'S A WHOLE NEW – IT'S A WHOLE NEW BALL GAME.

BY MS. SUTHERLAND:

Q WERE THE CHILDREN PROTECTED IN THIS PROCESS?

MR. STEBENS: OBJECTION; INCOMPLETE HYPOTHETICAL.

[1118] THE COURT: SUSTAINED.

BY MS. SUTHERLAND:

Q BEFORE THE AGENCY BECAME INVOLVED IN THE LIVES OF KENDALL HARDWICK, PRESLIE HARDWICK, AND DEANNA FOGARTY-HARDWICK, DID THE MOTHER AND CHILDREN ENJOY A FUNCTIONAL MATERNAL-CHILD RELATIONSHIP?

A YES.

Q ARE YOU FAMILIAR WITH THE PHRASE "AGENCY CASE"?

A YES.

Q WHAT DOES THAT MEAN?

A IT'S A CASE WHERE EVERYONE IN THE SOCIAL SERVICES AGENCY KNOWS IT AND EVERYBODY HAS OPINIONS ABOUT IT. IT JUST KIND OF BECOMES A CELEBRITY CASE, AND USUALLY NOT IN A POSITIVE WAY. AND SO

THEN THERE IS DIVISIONS WITHIN THE RANKS ABOUT IF THIS IS GOOD OR IF THIS IS BAD, AND IT'S SOMEWHAT DIVISIVE.

I THINK THIS IS REALLY EVIDENT IN THE FACT THAT THERE WERE ACCUSATIONS MADE AGAINST THE MOTHER BY SOCIAL WORKERS SAYING SHE WAS MENTALLY ILL AND HAD A PERSONALITY DISORDER WHEN THERE WASN'T ANY EVIDENCE TO SUPPORT THAT.

* * *

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DEANNA FOGARTY-HARDWICK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

DEANNA FOGARTY-HARDWICK & ROES 1-5, Plaintiffs, v. COUNTY OF ORANGE, et al., Defendants.	) Case No. 01CC02379) (Case Assigned to) Hon. Ronald L. Bauer,) Dept. CX103))) Date Action Filed: 2/15/01) Trial Date: 8/7/06)) PLAINTIFFS' MOTION IN) LIMINE TO EXCLUDE) INTRODUCTION INTO) EVIDENCE OF COACHING) OR UNDULY INFLUENCING) THE CHILDREN

SET ONE, NO. 2 OF 6
DATE: 12/29/2006
TIME: 9:00 a.m.
DEPT: CX103

GRANTED

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiff hereby moves this Court for an order to exclude any and all evidence which mentions, indicates, or otherwise suggests that the mother, Deanna Fogarty-Harwick [sic], plaintiff in the present action, coached or unduly influenced her minor children to make accusations of abuse.

This motion is made under the provisions of Evidence Code sections 350 and 352, and is based on the supporting Points and Authorities below, the pleadings and papers on file in this action, and upon such argument and evidence that may be presented prior to or at the hearing of this motion.

1.
INTRODUCTION

The present case arises from the wrongful conduct of defendants in their handling of juvenile court cases which resulted in the removal of plaintiff's minor children from her custody. Her minor children,

Kendall Hardwick and Preslie Hardwick, were the subject of proceedings filed in the juvenile division of the Orange County Superior Court, cases numbers DP002001 and DP002002.

Defendants will attempt to introduce evidence to infer that the mother coached or unduly influenced her children so that they would make accusations of abuse. These allegations are collateral to the issues presented in the present case, and their probative value, if any, is substantially outweighed by the prejudice that plaintiff suffer should the allegations be allowed t be presented before the jury.

During the divorce proceedings, the father claimed that the mother "programed" (sic) one of the children to make the accusation of abuse. (Declaration of Rogelio Sampaga Jr., pg. 2, para. 3, Exhibit A (page 8 of Order After Hearing Order to Show Cause, Orange County Superior Court, December 31, 2001).) The family court found that the mother believed that the accusation of child abuse was true, and then took the child to a licensed mental health professional for suspected sexual abuse, expecting that the provider would make the report. (*Id.*)

* * *

3.

A COURT HAS ALREADY DENIED AN AWARD EASED ON THE ALLEGATION OF COACHING OR UNDUE INFLUENCE

Family Code section 3027.1 allows an award of monetary sanctions and attorneys fees:

> "If a court determines, based on the investigation described in Section 3027 or other evidence presented to it, that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions . . . and reasonable attorney's fees. . . ." Fam. Code §3027.1(a).

The allegation of coaching or undue influence has already been made in a prior court proceeding, and the court declined to act on the matter. In 2001, at approximately the same time that the juvenile cases were pending, the children's mother and father, Cary W. Hardwick, were involved in divorce proceedings. The father made a claim for sanctions and attorneys fees based upon Family Code section 3027.1, essentially claiming that Deanna had coached or unduly influenced one of the children into making a false accusation of child abuse. The court made an investigation pursuant to statute, considered the claim, and then denied it. (Declaration of Rogelio Sampaga Jr., pg. 2, para. 3, Exhibit A (see page 8 of Order After Hearing Order to Show Cause, Orange County Superior Court, December 31, 2001)) It would be prejudicial to allow evidence on this collateral matter to come before the jury, particularly where a prior court has already made a decision on this point.

3. [sic]

COLLATERAL ESTOPPEL OPERATES TO PRECLUDE EVIDENCE OF COACHING

* * *

The underlying facts in prior proceeding (namely, the divorce proceeding between Deanna and Cary Hardwick) was a determination of whether Deanna coached or unduly influenced the children into making false accusations of abuse and the [sic] Deanna knew that such accusations were false when they were made. That court determined that there was not sufficient evidence to support that assertion, and that on the contrary, Deanna took the children to a professional for evaluation. (Declaration of Rogelio Sampaga Jr., pg. 2, para. 3, Exhibit A (page 8 of Order After Hearing Order to Show Cause, Orange County Superior Court, December 31, 2001).)

This is exactly the same allegation, with the exact same underlying facts, that defendants will attempt to introduce in the present proceeding. Both Cary Hardwick and the defendants in the present action share the role of contesting the suitability of Deanna's place as custodial mother of the children. For those reasons, it would be within the Court's discretion to find that there was a relationship "sufficiently close" and that in the interests of justice, any evidence of coaching or undue influence should be excluded from evidence.

* * *

6.

CONCLUSION

Based on the foregoing reasons, plaintiff respectfully requests an order to exclude any and all evidence which mentions, indicates, or otherwise suggests that the mother coached or unduly influenced the children to make accusations of abuse.

Dated: December 18, 2006

THE LAW OFFICES OF
SHAWN A. MCMILLAN, APC

/s/ Rogelio Sampaga
Rogelio Sampaga Jr., Esq.
Attorneys for Plaintiff,
DEANNA FOGARTY-HARDWICK

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* * *

DECLARATION OF ROGELIO SAMPAGA JR.

I. ROGELIO SAMPAGA JR., hereby declare and state:

1. I am an attorney at law duly admitted to practice before all of the courts of the State of California and I am employed with The Law Offices of Shawn A. McMillan, A.P.C., one of the attorneys of record herein for DEANNA FOGARTY-HARDWICK, plaintiff in the present action.

2. The following facts to which I hereby declare are of my own personal knowledge and if called upon

to testify to the truth and veracity thereof, I would and could competently do so.

3. Attached as Exhibit "A" is a true and correct copy of the findings and order of Walter D. Posey, Commissioner of the Superior Court, Superior Court of California, County of Orange, entitled "Order After Hearing Order to Show Cause:" in case number 95 D-00 48 98, In re marriage of: Deanna Hardwick and Cary Hardwick, filed on December 31, 2001.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 18 day of December, 2006, in San Diego, California.

/s/ Rogelio Sampaga
Rogelio Sampaga Jr., Declarant

EXHIBIT
A

[Previously Reproduced At App. To Cert. Petition 72-91]